

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF**



75-50003

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P/S

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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In the Matter of  
INTERMODAL FREIGHT FORWARDING, INC.,

Bankrupt,

ROBERT J. PIEROT,

Appellant.

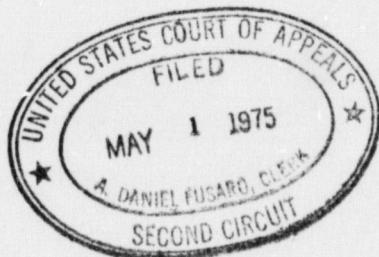
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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

BRIEF FOR APPELLANT

FISHER, AXENFELD & BERSANI  
Attorneys for Appellant  
188 Montague Street  
Brooklyn, New York 11201  
(212) 624-0608

EDWARD W. ZAWACKI, ESQ., AND  
HAROLD L. Fisher, Esq.,  
of Counsel



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PRELIMINARY STATEMENT

This is an appeal from an order of the Hon. Charles E. Stewart, Judge, United States District Court for the Southern District of New York.

STATEMENT OF ISSUE PRESENTED  
FOR REVIEW

Did the making of an order directing the Appellant to prepare, make oath to and file schedules of assets and liabilities and a statement of affairs of an involuntary corporate bankrupt and otherwise perform the duties of the bankrupt, without giving the Appellant notice and an opportunity to be heard in opposition to the order, constitute a denial of the Appellant's right to due process of law?

STATEMENT OF THE CASE

On or about December 6, 1973 an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of New York against INTERMODAL FREIGHT FORWARDING, INC., an alleged bankrupt. An adjudication of bankruptcy followed the corporation's (hereinafter the "bankrupt") failure to timely appear in the proceeding.

On February 25, 1974 an ex parte order of the Bankruptcy Court (Herzog, J.) was entered and served upon ROBERT J. PIEROT (hereinafter the "Appellant"). Said order directed the Appellant to prepare, make oath to and file schedules of assets and liabilities and statements of affairs of the bankrupt as required by §7a(8) of the Bankruptcy Act (11 U.S.C. §25 a(8)) and to perform the duties imposed upon the bankrupt pursuant to §7b of the Bankruptcy Act (11 U.S.C. §25b).

The Appellant moved the Bankruptcy Court (Herzog, J.) to vacate this order. This motion was denied and Appellant appealed to the District Court.

On appeal, the District Court (Charles E. Stewart, J.) affirmed, without opinion, the Bankruptcy Court's denial of the motion to vacate the ex parte order.

#### SUMMARY OF ARGUMENT

The Appellant contends that the ex parte order of the Bankruptcy Court violates the Fifth Amendment of the United States Constitution. <sup>That</sup> Requiring the Appellant to use his own assets and devote his own time to comply with an order of a federal court, made without prior notice to the Appellant and without affording him an opportunity to oppose the application for such an order, resulted in a deprivation of Appellant's liberty and property without due process of law, thereby rendering the order a nullity.

### STATEMENT OF FACTS

The bankrupt was organized in 1969 to conduct the business of freight forwarding and customs house brokerage. The Appellant was an investor in the initial venture, having contributed a large portion of the cash required to initiate the bankrupt's operations. Part of the Appellant's investment was capitalized by the bankrupt and shares of stock were issued to the Appellant. The balance of the investment remained a loan to the bankrupt, to this date uncollected. Because of his investment in the bankrupt the Appellant was made a member of its board of directors and a vice president. His official capacity in the bankrupt notwithstanding, the Appellant was a director and officer in name only. He was not then and is not now a customs broker and has no knowledge of that trade or of freight forwarding. His livelihood is the business of brokering the purchases and sales of ships. During the life of the bankrupt the Appellant never participated in the running of its daily affairs and operations. All of the employees and other officers of the bankrupt reported directly to and were responsible only to A. PHILIP VISSER, the bankrupt's president and operating officer.

On August 8, 1973, INTERMODAL FREIGHT FORWARDING, INC., executed an Assignment for the Benefit of Creditors to Conrad J. Duberstein, Assignee, (hereafter the "Assignee"), which assignment was duly filed with the Clerk of the County of New York on the same day. On or about December 6, 1973, an involuntary petition in bankruptcy was filed against INTERMODAL FREIGHT FORWARDING, INC., an alleged bankrupt.

On December 10, 1973 the Assignee filed with the Bankruptcy Court a verified list of 318 creditors of the alleged bankrupt.

On January 15, 1974, INTERMODAL FREIGHT FORWARDING, INC., having failed to appear in the proceeding, was adjudicated a bankrupt.

On January 31, 1974, a first meeting of creditors of the bankrupt was held and HARRIS D. LEINWAND was nominated and appointed to serve as Trustee. The Court considered the bankrupt's failure to file its schedules of assets and liabilities and statement of affairs and, relying on the statement of the Assignee (10), directed the bankrupt's president, A. PHILIP VISSER, (hereafter "VISSER"), who was not present in the courtroom, to file schedules of assets and liabilities and its statement of affairs on or before February 25, 1974 and to carry out the duties imposed upon the bankrupt by Section 7 (b) of the Bankruptcy Act. This direction was re-

duced to an order and service by ordinary mail was made upon VISSER on February 6, 1974, (13-14)

On February 25, 1974, VISSER, having failed to comply with the court order, the Trustee made an oral application for an order directing the Appellant to prepare, make oath to and file schedules of assets and liabilities and a statement of the bankrupt's affairs and to perform the duties of the bankrupt. The Appellant, neither in person nor by counsel, was present when this application was made, was given no opportunity to resist the application and, in fact, had no knowledge of any proceedings pending against the bankrupt since the date of the execution of the assignment for the benefit of creditors. The Bankruptcy Court did not ask for, nor did the Trustee offer, reason why prior notice of the application should not be given to the Appellant. The Trustee's application was nevertheless granted and an order was entered directing the Appellant to prepare, make oath to and file the aforementioned schedules and statement of affairs on or before March 20, 1974 (15-16). Service of the order was made on the Appellant by ordinary mail. The date for compliance with this order was subsequently extended by the Bankruptcy Court.

On May 15, 1974, the Appellant moved to vacate the ex parte order of February 25, 1974 (26). The Trustee served and filed his answer at the hearing of the motion on May 23, 1974 (32).

An order denying the motion was entered on May 28, 1974 (45).

On June 5, 1974 the Appellant filed with the United States District Court for the Southern District of New York a notice of appeal from the order denying his motion.

On January 8, 1975 the District Court (Stewart, J.) entered an order affirming, without opinion, the denial of the Appellant's motion (3).

POINT I

DUE PROCESS OF LAW RE-  
QUIRES NOTICE AND AN  
OPPORTUNITY TO BE HEARD

This appeal presents an unusual and perhaps the first application of an aspect of the due process clause of the Fifth Amendment of the United States Constitution: Is an officer of an involuntary corporate bankrupt required to be given notice of the impending exercise of federal judicial power against him?

The fundamental right of due process of law, incapable of any precise definition, has never been a term of fixed and invariable content. Federal Communications Commission v. W.J.R., The Goodwill Station, 337 U.S. 265, 69 S.Ct. 1097, 93 L.Ed. 1353. The concept, though fluid in its many applications to the American system of justice, is "founded upon considerations of fundamental fairness." Goddard v. Frazier, 156 F. 2d 938, 941 (10th Cir.), cert. den'd, 329 U.S. 765, 67 S.Ct. 124, 91 L.Ed. 659. In the context of judicial proceedings, due process of law has been held to mean a law which hears before it condemns, a law which proceeds on inquiry. Truck v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 65 L.Ed. 254. The obvious purpose of the due process clause is to check the arbitrary, unbridled and unreasoned use of power.

The clause is really a guide for "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." Pennoyer v. Neff, 95 U.S. 714, 733; 24 L.Ed. 565. To have any legal force in the administration of justice the notion of fair play in the context of the due process clause must mean that a person has an opportunity to be heard and to defend and protect his rights in an orderly proceeding adapted to the nature of the case. It must assure to every person his day in court. Truax, supra. The due process clause in a judicial proceeding minimally requires the giving of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, citing Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278.

The notice requirement <sup>enunciated</sup> ~~enunciated~~ in Mullane implies more than mere lip service to the constitutional mandate. Notice given after judicial action <sup>is</sup> ~~is~~ a fait accompli is precisely what that case seeks to avoid in requiring that interested parties be apprised of the pendency of an action.

In the present proceeding, the Appellant received no notice that he was being subjected to the exercise of judicial power until after that power was exercised. There may be occasions and circumstances in which prior notice is not prudent and will not serve the interests of all the parties. That no such occasion was present in this proceeding will be treated with below.

The other essential requirement of due process is the opportunity to be heard. Windsor v. McVeigh, 93 U.S. 274; Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 53 L.Ed. 1363. Implicit in the phrase "opportunity to be heard" is the giving to the interested party a choice. As the court in Mullane stated: "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314. The choice must perforce be personal to the interested party and the opportunity to choose must arise at a meaningful time in a meaningful manner. Armstrong v. Mincey, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. In Armstrong, the Supreme Court overturned an adoption decree of a Texas court in which the father of the adopted child was given no notice of the pending adoption proceeding until the day the decree was entered.

The father moved to vacate the decree and the motion was denied. The Supreme Court held that "(i)t is clear that failure to give the petitioner notice of the pending adoption proceeding violated the most rudimentary demands of due process of law." 380 U.S. at 550; and that the constitutional infirmity resulting from the failure to give notice was not cured by the subsequent hearing on the motion to set aside the decree. 380 U.S. at 552.

In the present proceeding it must be conceded that the Appellant was deprived of the notice and the opportunity to contest the making of the order requiring him to prepare, swear to and file the bankrupt's schedules of assets and liabilities and statement of affairs and otherwise perform the duties of the bankrupt. There is no record of the proceeding before the Bankruptcy Court of February 25, 1974. One can only speculate whether an inquiry was made about the propriety of so directing the Appellant or about his ability to comply with the resulting order. There is no record that any evidence was adduced prior to the court's determination that the Appellant was the appropriate person to perform the duties of the bankrupt. If what occurred in the proceeding of January 31, 1974 indicates what occurred on February 25, 1974, it is fair to say that someone, perhaps the Trustee, merely stated, without factual support, that the

Appellant was an officer of the bankrupt and to him, therefore, should be relegated the thankless task of demonstrating its financial condition under oath and perform what other duties the court saw fit. Certainly the Appellant was not present to accede to the court's wishes, to offer his assistance, to object, to contest, to offer evidence or to explain why he should not be designated by the Court. It is the failure to advise the Appellant that judicial action was about to be taken against him and the manner in which that action was taken, foreclosing in advance any objections he could have made, which the Appellant asserts is a deprivation of his constitutional right secured by the due process clause of the Fifth Amendment.

POINT II

THE APPELLANT WAS ENTITLED  
TO DUE PROCESS OF LAW FROM  
THE COURT BELOW

A. The Bankruptcy Act and Bankruptcy Courts are Subject to Due Process.

Without question the due process clause of the Fifth Amendment applies, with all of its ramifications and nuances, to criminal and civil proceedings in the federal judicial system. No one will argue, moreover, that the Bankruptcy Act and federal courts sitting in bankruptcy are not subject to the limitations and safeguards of due process.

In re Burke, 51 F.Supp. 552 (S.D.Ga. 1943); In re Progress Lektro Shave Corp., 35 F.Supp. 915 (D.Conn. 1940), citing Louisville Joint Stock Bank v. Radford, 295 U.S. 555, 55 S.Ct. 854, 79 L.Ed. 1953. Both due process rights to notice and the opportunity to be heard arise in bankruptcy proceedings.

In Application of the Commonwealth of Massachusetts, 206 F.Supp. 106 (D.Mass. 1962), the State of Massachusetts requested an order from a Bankruptcy Court that the unclaimed dividends of a bankrupt's estate escheat to the State. No prior notice of this application was given to the bankrupt's unknown creditors. In denying the application the court held a failure to give notice was an unconstitutional denial of due process.

In the Matter of George W. Meyers, Co., 412 F.2d 785 (3rd Cir. 1969) the debtor contested the involuntary petition. At a hearing on the issue of the debtor's insolvency, the petitioning creditors offered evidence of the insolvency, at the close of which the debtor rested without offering testimony. An adjudication of bankruptcy followed and the debtor petitioned for review. After the case was remanded for a second hearing, the referee refused to allow the debtor to offer evidence at the second hearing and re-affirmed the previous order of adjudication. The Court of Appeals for the Third Circuit found this to be a deprivation of the debtor's due process right to an opportunity to be heard. It held that its election to not offer rebuttal evidence at the first hearing was not a waiver of its right to offer rebuttal evidence at the second hearing. Accord, In re Central R. Co. of New Jersey, 136 F.2d 633 (3rd Cir. 1942), in which the State Attorney General appeared in a railroad re-organization proceeding but was not given the opportunity to participate in the determination of the settlement of the State's claims for unpaid property taxes.

B. No Compelling Reason Existed for  
Not Giving The Appellant Notice  
and an Opportunity to Be Heard.

Due process may sometimes require the balancing of rights of various adverse parties. This arises most often in the "attachment" cases in which there are conflicting claims to property. E.g. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. \_\_, 95 S.Ct. 719, 42 L.Ed.2d 751; Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406; Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 556. In Mitchell, the Supreme Court upheld the validity of an ex parte attachment order which did not provide for notice to the debtor. In such cases there may very well be a need for swift action to protect a res, which is the creditor's security for a debt, without giving the debtor the opportunity to dispose of or secrete it. In a bankruptcy proceeding the usual justification for an ex parte order, such as the one issued to the Appellant, is to protect the assets of the bankrupt's estate from rapid depletion. This justification did not exist in the present case. By the time that an adjudication of bankruptcy was made, the Assignee had already collected about \$240,000.00 of the bankrupt's assets. (Assignee's Final Account, p.11). By the time that the complained of order had been issued to the Appellant, the bankrupt had been out of business for approximately six months.

The bankrupt's assets, moreover, did not consist of marketable or perishable goods but of office equipment (which was sold by the Assignee) and accounts receivable (a large sum of which was collected by the Assignee and the right to collect most of the balance was assigned to a creditor with court approval (Order approving stipulation and stipulation, p.2) ).

In short, the bankrupt's financial affairs were in limbo and no valid argument for expedient action could prevail over the Appellant's right to due process.

C. The Appellant Was Deprived of Liberty and Property Without Due Process

Due process seeks to avoid the unbridled exercise of power, to prevent, in effect, the abuse of power. The conduct of this proceeding toward the Appellant has unfortunately fallen short of the constitutional goal. Twice the Trustee failed to use the expertise of the bankrupt's only officer, VISSER, who had knowledge of the bankrupt's operations and activities. When the Trustee first discovered that VISSER left the country (15), he singled out the Appellant to perform the bankrupt's duties.

The Trustee was subsequently advised that VISSER had returned to the United States and was present in New York. The Trustee nevertheless failed to seek VISSER'S compliance with the order directing him to perform the duties of the bankrupt, even though the Trustee believed the order to be valid and VISSER never contested its validity.

Throughout this proceeding the Trustee frustrated all attempts by the Appellant to comply with the order.

On March 26, 1974, after the date fixed for Appellant's compliance with the order, the Trustee informed the Appellant that the bankrupt's books and records were in five different locations in New York City (49).

On May 2, 1974 the Trustee advised the Appellant, by his attorneys, that the bankrupt's books and records were in the custody of J.H. Lasser & Company (46). Thereafter, the Trustee's partner stated that the books were not with Lasser (47).

At the hearing of the Appellant's motion to vacate the order, the Trustee stated that only some of the bankrupt's books and records were with Lasser (40-41). Throughout the course of proceedings in the court below, there is not the slightest evidence of fair and even-handed treatment of the Appellant.

The bankrupt's records were stored at five different locations within New York City and in eight other cities in the United States where the bankrupt maintained offices. A full and proper examination of those records relative to preparing schedules of the bankrupt's assets and liabilities necessarily requires that the Appellant either travel to the several locations of those books, or send a retained accountant to each of those locations or engage a local accountant in each city. Without knowing the extent of the contents of the bankrupt's books and records, it can only be said that the expense to the Appellant would be considerable and he is not entitled to be reimbursed for those expenses or compensated for those services. Goldie v. Cox, 130 F. 2d 690 (8th Cir. 1942). The Trustee anticipated that these expenses may run as much as \$10,000.00 (50). Although it is the bankrupt's obligation under 11 U.S.C. §25 to prepare and file schedules of its assets and liabilities and a statement of its affairs, this obligation cannot be summarily thrust upon the Appellant by an order which operates against him personally and which requires this expenditure. Although the Appellant was an officer of the bankrupt, he is not the bankrupt and is not to be treated as such. Ginsberg & Sons, Inc. v. Papkin, 285 U.S. 204, 52 S.Ct. 322, 76 L.Ed.704;

In re Bush Terminal Co., 102 F.2d 471 (2nd Cir. 1939).

The appellant is separately entitled to the protections afforded by due process and due process was denied to him

Although the Trustee insisted in the propriety of the order against the Appellant and persisted in his attempts to have the Appellant comply with it, he never disclosed that he had obtained an order authorizing him to retain accountants to do what he was requiring of the Appellant (52-55). In his application for permission to retain accountants the Trustee outlined the services the accountants would perform, *inter alia*: prepare schedules of accounts payable and receivable, examine income and expense accounts and the corporate minutes, resolutions and stock records of the bankrupt and "(a)ny and all such other services which petitioner and his firm will be required to render in order that a complete and proper understanding of the debtor's affairs may be obtained and presented." (53-54). Certainly these services, regardless of how the Trustee chose to describe them, are the same as those required of the Appellant. It seems that the Trustee unreasonably seeks to put the Appellant through his own needless personal expense. This conduct in all respects denied the Appellant the fair treatment which was his due under the Fifth Amendment.

The Appellant was entitled to notice of the application for the order of the Bankruptcy Court of February 25, 1974, he was entitled to an opportunity to be heard in opposition to that order before it was made; and he was entitled to be treated in a fair and reasonable manner throughout the course of proceedings in the Bankruptcy Court. Because the Appellant received ~~none~~<sup>none</sup> of these considerations mandated by the Fifth Amendment of the United States Constitution, the action taken against him in the Bankruptcy Court was null and void.

CONCLUSION

For the foregoing reasons, the order of the District Court, affirming the denial of the Appellant's motion to vacate the order of the Bankruptcy Court directing him to prepare, make oath to and file schedules of assets and liabilities and a statement of affairs of the bankrupt and otherwise perform the duties of the bankrupt, should be reversed.

Respectfully submitted,

FISHER, AXENFELD & BERSANI  
Attorneys for Appellant  
183 Montague Street  
Brooklyn, New York  
(212) 624-0608

ADDENDUM OF STATUTES:

U.S. CONST., AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

11 U.S.C. §26:

(a) The bankrupt shall \*\*\*

(8) prepare, make oath to, and file in court within five days after adjudication, if an involuntary bankrupt, and with his petition, if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof and its money value, in detail; and a list of all his creditors, including all persons asserting contingent, unliquidated, or disputed claims, showing their residences or places of business, if known or if unknown that fact to be stated, the amount due to or claimed by each of them, the consideration thereof, the security held by them, if any, and what claims, if any are contingent, unliquidated or disputed; and a claim for such exemptions as he may be entitled to; all in triplicate, one copy for the clerk, one for the referee, and one for the trustee: Provided, however, that the court may for cause shown grant further time for the filing of such schedules if, with his petition in a voluntary proceeding or with his application to have such time extended in an involuntary proceeding, the bankrupt files a list of all such creditors and their addresses; (9) file in triplicate with the

with the court at least five days prior to the first meeting of his creditors a statement of his affairs in such form as may be prescribed by the Supreme Court;

\*\*\*\*\*

Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title.

